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No. 07-1410

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

NAVAJO NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

I. This Court's decision and mandate in *Navajo* foreclosed the bases for liability adopted by the Federal Circuit 2
II. The Federal Circuit's ruling is inconsistent with *Navajo* and the decisions reaffirmed in *Navajo* 5
A. Neither the Rehabilitation Act nor SMCRA furnishes a valid basis for the Tribe's Indian Tucker Act claim 5
1. The Rehabilitation Act 6
2. SMCRA 13
B. The Indian Tucker Act's waiver of sovereign immunity does not extend to claims based on purported common-law trust duties 15
C. In alleging generalized breaches of fiduciary duty, the Tribe mischaracterizes the underlying events 21

TABLE OF AUTHORITIES

Cases:

Austin v. *Andrus*, 638 F.2d 113 (9th Cir. 1981) 10
Bennett v. *Spear*, 520 U.S. 154 (1997) 3
Green Tree Fin. Corp. v. *Randolph*, 531 U.S. 79 (2000) ... 3
Gulf Ref. Co. v. *United States*, 269 U.S. 125 (1925) 4
Jefferson County v. *Acker*, 527 U.S. 423 (1999) 3
Manhattan Gen. Equip. Co. v. *Commissioner*, 297 U.S. 129 (1936) 15
NCAA v. *Smith,* 525 U.S. 459 (1999) 4
Smiley v. *Citibank*, 517 U.S. 735 (1996) 15

Cases—Continued: Page

United States v. *Mitchell*:
445 U.S. 535 (1980) 4, 16
463 U.S. 206 (1983) 17, 18
United States v. *Morton*, 467 U.S. 822 (1984) 15
United States v. *Navajo Nation*:
537 U.S. 808 (2002) 23
537 U.S. 488 (2003) . . . . . *passim*
United States v. *White Mountain Apache Tribe*,
537 U.S. 465 (2003) 17
Webster v. *Doe*, 486 U.S. 592 (1988) 13

Statutes and regulations:

Act of Aug. 15, 1894, ch. 290, 28 Stat. 305 8
Act of June 7, 1897, ch. 3, 30 Stat. 85 8
Act of Feb. 14, 1920, ch. 75, § 1, 41 Stat. 415
(25 U.S.C. 413 note) 7
Act of Aug. 9, 1955, ch. 615, 69 Stat. 539:
§ 1, 69 Stat. 539 (25 U.S.C. 415) 7
§ 3, 69 Stat. 540 (25 U.S.C. 396) 7
Indian Long-Term Leasing Act, 25 U.S.C. 415 . . . . . 8, 11
25 U.S.C. 415 (1958) 11
25 U.S.C. 415 (Supp. II 1960) 11
25 U.S.C. 415(a) 7
Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a
et seq. 2
25 U.S.C. 396a 6, 7, 9
25 U.S.C. 396d 7

Statutes and regulations—Continued: Page

Indian Mineral Development Act of 1982, 25 U.S.C. 2101 *et seq.* 4
Indian Tucker Act, 28 U.S.C. 1505 16
Navajo-Hopi Rehabilitation Act, ch. 92, § 1, 64 Stat. 45 12
Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et seq.* 2
25 U.S.C. 631 . . . . . 11, 12
25 U.S.C. 632 12
25 U.S.C. 635 . . . . . 6, 8, 9, 12
25 U.S.C. 635(a) 6, 9, 10, 11
25 U.S.C. 635(b) 10, 11
25 U.S.C. 635(c) 10, 11
25 U.S.C. 638 . . . . . 6, 11, 12, 13
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* 2
30 U.S.C. 1300 14
30 U.S.C. 1300(c) 14
30 U.S.C. 1300(d) 14
30 U.S.C. 1300(e) 14, 15
Tucker Act, 28 U.S.C. 1491(a)(1) 16
25 U.S.C. 177 9
25 U.S.C. 397 . . . . . 8, 9
25 U.S.C. 399 4
25 U.S.C. 402 9
25 U.S.C. 402a 9

Regulations: Page

25 C.F.R.:
Pt. 131 (1966) 8
Pt. 162 8
Section 162.103(a)(1) 8
Pt. 171 (1938) 8
Section 171.1 9
Section 171.12 9
Pt. 171 (1949):
Section 171.1(i) 9
Section 171.9 9
Pt. 171 (1966) 7
Section 171.10 7
Pt. 200:
Section 200.11(b) 14, 15
Pt. 211 ..... 7, 19
Section 211.2 (1987) 19
Section 211.10 (1987) 7
Section 211.27(a) 7
30 C.F.R.:
Pt. 211 (1965) 7
Pt. 750:
Section 750.6 13
Section 750.20 (1987) 15
43 C.F.R. Pt. 3480 7

Regulations—Continued: Page

Department of the Interior, *Regulations Governing the Leasing of Allotted and Tribal Indian Lands for Farming, Grazing, and Business Purposes* (July 20, 1923):

§ 9(b) 8

§ 9(f) 8

§ 10 8

Miscellaneous:

Felix S. Cohen, *Handbook of Federal Indian Law* (1942) 9

53 Fed. Reg. 3993 (1988) 15

54 Fed. Reg.(1989):

p. 22,182 15

p. 22,187 15

J.A. Krug, *The Navajo: A Long-Range Program for Navajo Rehabilitation* (1948) 12

Power of the Navajo Tribe to Lease Tribal Land to the Government for a Helium Plant, 58 Interior Dec. 351 (1943) 8

S. Rep. No. 1123, 86th Cong., 2d Sess. (1960) 11

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The Federal Circuit has held the United States liable as a matter of law for up to $600 million on the Tribe's breach-of-trust claim. That ruling cannot be squared with this Court's prior decision in this very case, which found "no warrant from any relevant statute or regulation" to impose liability, and therefore "h[e]ld that the Tribe's claim for compensation from the Federal Government fails." *United States* v. *Navajo Nation*, 537 U.S. 488, 493, 514 (2003) (*Navajo*). Reversal is warranted for that reason alone.

Even if *Navajo* did not completely bar further litigation on the Tribe's claim, the Federal Circuit's decision contravenes *Navajo* and this Court's prior precedents. Those decisions require that the plaintiff identify "specific rights-creating or duty-imposing statutory or regulatory prescriptions" that the government has allegedly violated for a claim to "fall[] within the terms" of the waiver of sovereign

immunity in the Tucker and Indian Tucker Acts. *Navajo*, 537 U.S. at 503, 506.

The Tribe contends (Br. 33-42) that the Secretary violated the Navajo-Hopi Rehabilitation Act (Rehabilitation Act), 25 U.S.C. 631 *et seq.*, and the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* That statutes, however, have nothing to do with the royalty rates in Lease 8580, which were instead governed only by the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. 396a *et seq.*, and its implementing regulations. The Tribe's and the Federal Circuit's reliance on other statutes—*minus* IMLA, the one statute that *did* apply to the approval of Lease 8580—merely underscores how far the Federal Circuit has strayed from this Court's governing decisions. *A fortiori*, the Federal Circuit erred in also premising liability on violations of judge-made duties inspired by common-law notions.

I. THIS COURT'S DECISION AND MANDATE IN *NAVAJO* FORECLOSED THE BASES FOR LIABILITY ADOPTED BY THE FEDERAL CIRCUIT

This Court's 2003 decision in this case resolved the Tribe's breach-of-trust claim and foreclosed its reinstatement on remand. Gov't Br. 23-29. That decision "h[e]ld that the Tribe's *claim* for compensation from the Federal Government"—not just an argument supporting that claim—"fails," explaining that there is "no warrant from *any relevant statute or regulation* to conclude that [the Secretary's] conduct implicated a duty" that could support a damages claim. *Navajo*, 537 U.S. at 493, 514 (emphases added).

The Tribe attempts to minimize that holding by stating (Br. 30) that it must be read in "context." Context, however, reinforces the explicit language of the Court's opinion.

The question presented in *Navajo* was not, as the Tribe suggests (Br. 27), "limited to whether the Secretary violated statutory or regulatory duties [under IMLA]." It asked whether the Federal Circuit "properly held" the United States liable "without finding" a breach of an IMLA duty. Gov't Br. 24. Consistent with that question presented, the United States argued that there was no violation of IMLA and, without such a finding, the United States could not be held liable.

Moreover, as the Tribe admits (Br. 27), it was entitled to—and did—argue "alternative ground[s]" for affirmance based on a network of statutes and regulations *beyond* IMLA. See *Bennett* v. *Spear*, 520 U.S. 154, 166-167 (1997). The Tribe does not dispute that its *lead* argument was that the "network" of provisions upon which it now relies governed every aspect of coal mining, imposed upon the United States "full responsibility to manage Indian resources and land for the benefit of Indians," and created money-mandating duties governed by "common law trust standards." Gov't Br. 25 (quoting Tribe's brief).

Nevertheless, the Tribe contends (Br. 28) that *Navajo* was "limited" to IMLA and did not resolve the Tribe's lead argument, notwithstanding the Court's statement that it had "no warrant from *any relevant* statute or regulation" to impose monetary liability. That reading is implausible, particularly because *Navajo* expressly noted that the Tribe relied on "discrete statutory and regulatory provisions" *beyond* IMLA. 537 U.S. at 509. This Court not infrequently resolves alternative grounds for affirmance raised by respondents—even, on occasion, those not pressed or passed upon in the court of appeals, *e.g.*, *Jefferson County* v. *Acker*, 527 U.S. 423, 442-443 & n.13 (1999). And, when the Court declines to reach such grounds, it normally says so. See, *e.g.*, *Green Tree Fin. Corp.* v. *Randolph*, 531 U.S.

79, 92 n.7 (2000); *NCAA* v. *Smith*, 525 U.S. 459, 462, 469-470 (1999).

That was precisely the case in *United States* v. *Mitchell*, 445 U.S. 535, 546 & n.7 (1980) (*Mitchell I*), which, as *Navajo* itself recognized, limited its ruling to a single statute and expressly "left open" the possibility that, on remand, "other sources of law might support the plaintiffs' *claims*." 537 U.S. at 504 (emphasis added). *Navajo* took a decidedly different course: It held that the Tribe's "claim for compensation * * * fails" because no relevant statute or regulation supported that claim. *Id.* at 493, 514.

The Tribe's reliance (Br. 28) on *Navajo*'s statement that the Court "rule[d] only on the Government's role in the coal leasing process under the IMLA," 537 U.S. 507 n.11, is misleading. *Navajo*'s very next sentence explains that the Court merely reserved judgment on whether IMLA imposed greater obligations regarding "oil and gas leases" than for coal leases, *ibid.*, not on whether other statutes imposed specific coal-leasing duties. And, in fact, the Court did address non-IMLA statutes: 25 U.S.C. 399 and the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. 2101 *et seq.* See 537 U.S. at 509. While the Tribe contends (Br. 29) that *Navajo* foreclosed reliance only on those provisions it "expressly" analyzed, the Court undoubtedly limited its non-IMLA discussion to Section 399 and IMDA because those were the only other provisions in the Tribe's asserted "network" that were even arguably relevant to the Secretary's actions. Gov't Br. 27-28.

Ultimately, the Tribe rests (Br. 29-30) on *Navajo*'s remand for further proceedings consistent with its opinion, 537 U.S. at 514. That disposition "has the effect of making the opinion a part of the mandate." *Gulf Ref. Co.* v. *United States*, 269 U.S. 125, 135-136 (1925). Consequently, it sometimes permits the performance of only "ministerial dut[ies]"

on remand, *ibid.*, as was the case here. While the Court may elect to remand with instructions to enter judgment or dismiss a complaint, it may also, out of an abundance of caution, remand for further proceedings consistent with its opinion to permit the court of appeals to assure itself that no other claim may be asserted and to take any appropriate steps to effectuate the Court's decision.

The Federal Circuit thus erred in reviving the very "claim" that *Navajo* held "fails." Reversal is warranted on that ground alone.

II. THE FEDERAL CIRCUIT'S RULING IS INCONSISTENT WITH *NAVAJO* AND THE DECISIONS REAFFIRMED IN *NAVAJO*

Even if this Court's mandate were not dispositive, the Federal Circuit's rationale cannot be reconciled with this Court's precedents because the Tribe has identified no specific statutory or regulatory prescription violated by the Secretary and because duties purportedly founded upon common-law principles cannot support an Indian Tucker Act claim.

A. Neither The Rehabilitation Act Nor SMCRA Furnishes A Valid Basis For The Tribe's Indian Tucker Act Claim

The Tribe contends (Br. 33-42) that the Rehabilitation Act and SMCRA impose monetary liability on the United States even though IMLA, which directly governed the Secretary's approval, does not. Neither statute has any application here, and the imposition of liability based on those statutes would in any event be inconsistent with the design of IMLA, confirmed in *Navajo*, to vest primary control over mineral leasing in tribes rather than the Secretary.

1. The Rehabilitation Act

The fundamental premise of the Tribe's Rehabilitation Act contentions is that Lease 8580 was approved under 25 U.S.C. 635(a) as part of the "program" authorized by the Rehabilitation Act. However, Lease 8580 itself demonstrates that it was authorized under IMLA; Section 635(a) does not govern mining leases or displace IMLA; and the Interior Department, the Tribe, and this Court have made clear that Lease 8580 is an IMLA, not Rehabilitation Act, lease. Moreover, the statutory direction to keep the Tribal Council and any affected communities informed of "plans" for the "program authorized by [the Rehabilitation Act]," 25 U.S.C. 638, does not extend to leasing under Section 635. Even if it did, it imposes no money-mandating duties and was not in any event violated by the Secretary.

a. The Tribe and its amici provide no answer to the explanation in our opening brief (at 47-48) that Lease 8580 was not—and could not have been—entered into or approved pursuant to the Rehabilitation Act. Congress established the maximum term for IMLA mineral leases in 25 U.S.C. 396a, and Lease 8580 specifies its own term with text drawn directly from that provision. J.A. 189; Gov't Br. 47-48. Lease 8580's initial ten-year term ended in 1974, and its secondary term extends *indefinitely* until the coal at issue is depleted or paying mining operations otherwise cease. *Ibid.* That same term has been utilized in IMLA leases since IMLA's 1938 enactment, and mining operations on leases from that period continue to this day.

In contrast, the Rehabilitation Act's only leasing provision, 25 U.S.C. 635(a), specifies that "[a]ll leases" issued under it "shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years." *Ibid.* Had Lease 8580 been issued under that authority, it

would have terminated when its initial ten-year term ended in 1974 because the lease (J.A. 188-220) contains no "provision[] authorizing [its] renewal." Even if Lease 8580's secondary term could be construed as contemplating a renewal of up to 25 years, the lease would have terminated by 1999. The parties, however, amended Lease 8580 in 1999, J.A. 547-555, and it continues in effect today.

Lease 8580's recognition that regulations at 25 C.F.R. Part 171 (currently Part 211) were "in force" with respect to the lease (J.A. 197) further confirms that Lease 8580 is an IMLA lease. As this Court explained in *Navajo*, the Part 211 regulations are "IMLA regulations" promulgated under 25 U.S.C. 396d. 537 U.S. at 494; see *id.* at 495-496; 25 C.F.R. 211.10 & p. 493 (1987) (IMLA lease term and statutory authority for leases under Part 211); 25 C.F.R. 171.10 & p. 235 (1966) (same); Gov't Br. 47 n.10; cf. 25 C.F.R. 211.27(a) & p. 645 (2008).[1]

b. Moreover, leasing under the Rehabilitation Act for "business purposes" does not encompass leasing for "mining purposes." Gov't Br. 47. Federal statutes authorizing leases of Indian lands have long distinguished among "mining," "grazing," "farming," and "business" purposes. See, *e.g.*, Act of Aug. 9, 1955, ch. 615, §§ 1, 3, 69 Stat. 539-540 (providing separate leasing authority for "mining purposes," "grazing purposes," "farming purposes," and "public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases") (codified as amended at 25 U.S.C. 396, 415(a)); 25 U.S.C. 396a (IMLA of 1938; "mining purposes"); Act of Feb. 14, 1920, ch. 75, §1, 41 Stat. 415 (25 U.S.C. 413 note)

[1] Lease 8580 also identifies regulations at 30 C.F.R. Part 211, for which 43 C.F.R. Part 3480 is the present-day successor. Those regulations concern coal-mining operations, not leasing authority.

("mineral, farming, grazing, business, or other purposes"); Act of June 7, 1897, ch. 3, 30 Stat. 85 ("farming," "grazing," "mining or business purposes"); Act of Aug. 15, 1894, ch. 290, 28 Stat. 305 (same); 25 U.S.C. 397 (enacted 1891).

The pre-existing regulations that Interior amended to implement Rehabilitation Act leasing under Section 635 (25 C.F.R. Part 162; formerly Part 171 in 1956) have also long distinguished between leases for "mining" and "business" purposes. See Gov't Br. 47 & n.10.[2] And today's Section 635 regulations expressly exclude "[m]ineral leases" from their scope. 25 C.F.R. 162.103(a)(1). That interpretation of Section 635 is entitled to *Chevron* deference (Gov't Br. 47), and the Tribe offers no response. Not surprisingly, Lease 8580 nowhere refers to the Rehabilitation Act's implementing leasing regulations (25 C.F.R. Part 131 in 1964, now Part 162); the Federal Circuit disclaimed any reliance on Part 162, Pet. App. 27a n.3; and the Tribe does not appear to assert that those regulations govern Lease 8580. Cf. Br. 45 & n.12.

The inapplicability of Section 635 to mining leases governed by IMLA reflects Congress's reasons for authorizing leases for "business purposes." Before the 1955 enactment of the Indian Long-Term Leasing Act, 25 U.S.C. 415, "no general legislation authoriz[ed] leases of tribal [as opposed to allotted] lands for purposes other than farming, grazing, and mining." *Power of the Navajo Tribe to Lease Tribal*

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[2] See, *e.g.*, Department of the Interior, *Regulations Governing the Leasing of Allotted and Tribal Indian Lands for Farming, Grazing, and Business Purposes* §§ 9(b) and (f), 10 (July 20, 1923) (separately setting terms for "grazing," "farming," and "business leases"; explaining that leasing of "tribal lands for mining purposes" was governed by different regulations); 25 C.F.R. Part 171 (1938) (successor to 1923 regulations; promulgated in 1929 to govern grazing, farming, and business leases on tribal and allotted land).

Land to the Government for a Helium Plant, 58 Interior Dec. 351, 353 (1943); see Felix S. Cohen, *Handbook of Federal Indian Law* 328-329 (1942); *e.g.*, 25 U.S.C. 396a (IMLA; mining), 397 (grazing and mining), 402 (farming), 402a (farming). Without such statutory authority, authorization for business uses was by short-term "permit[s] revocable in the discretion" of Interior officials. See 25 C.F.R. 171.1(i), 171.9(c) (1949) (five-year permits for "business purposes"); 25 C.F.R. 171.1, 171.12 (1938); cf. 25 U.S.C. 177. That regime discouraged capital investment.

Congress specifically addressed that problem for the Navajo (and Hopi) by authorizing leasing for "business purposes" under Section 635 with terms up to 25 years plus one 25-year extension. Gov't Br. 46-47. Congress had no occasion in that Act to make similar adjustments for "mining" leases, because IMLA already permitted such leases to extend until the end of mineral production in paying quantities. 25 U.S.C. 396a. Section 635 accordingly specifies that it shall not be construed to "affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law." 25 U.S.C. 635(a). Thus, regardless of its application in other contexts, Section 635 by its own terms could not "affect" the Secretary's lease-approval authority under IMLA and its regulations, which, as this Court held, embody no duties relevant to this case. *Navajo*, 537 U.S. at 508, 510-511 & n.16, 514.

c. The Interior Department has repeatedly confirmed that Lease 8580 is an IMLA lease. Secretary Hodel approved the Tribe's requested lease amendments in 1987 based on a Departmental analysis explaining that Lease 8580 was "entered into" under IMLA and that the Secretary's approval was governed by IMLA. C.A. App. A868. Not only do the Tribe's own proposed factual findings repeatedly cite and agree with that 1987 analysis, J.A. 524-

525, but the internal draft of a decision in Peabody's appeal that the Tribe believes Interior should have issued in 1985 also makes clear that Lease 8580 "was entered into pursuant to the authority contained in 25 U.S.C. § 396a." J.A. 108. The government has consistently explained in this case that Lease 8580 is an IMLA lease;[3] the Tribe has repeatedly represented to this Court that Lease 8580 and its amendments were approved under IMLA;[4] and this Court has already determined that Lease 8580 is "covered by the IMLA." *Navajo*, 537 U.S. at 495.

The Tribe's new assertion (Br. 39) that "[n]either [Lease 8580] nor the lease amendments were approved as IMLA leases" thus is remarkable. Indeed, if the Tribe's current position were correct, most of the Court's 2003 decision in this case, which addresses IMLA in great detail, would have been advisory. As explained above, however, the Tribe's prior position was—and remains—correct: "Lease 8580 and the lease amendments are governed *only* by the IMLA." J.A. 564 (emphasis added).

d. The Tribe's reliance (Br. 35) on Section 635(b) and (c) does not support its view that Section 635(a) is money mandating. Both provisions address matters unrelated to Section 635(a) lease approvals: Subsection (b) clarifies the

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[3] As the Tribe notes (Br. 38), the Department of Justice filed an appellees' brief in 1978 in *Austin* v. *Andrus*, 638 F.2d 113 (9th Cir. 1981), that, without explanation, cited Section 635 as authorizing Secretarial approval of Lease 8580. That reliance on Section 635 was erroneous and, in any event, immaterial to the question in *Austin*, which addressed whether the displacement of individuals by mining activities constituted displacement by government action merely because the Secretary approved the Tribe's underlying mineral lease.

[4] See, *e.g.*, Br. in Opp. 1, 6-7, *Peabody Coal Co.* v. *Navajo Nation*, 543 U.S. 1054 (2005) (No. 04-634); 01-1375 Resp. Br. 15, 20-21, 39 (Secretary "abus[ed] his approval power under 25 U.S.C. § 396a"); 01-1375 Br. in Opp. 20 (same).

Tribe's right to transfer *non-trust* lands that the Tribe itself holds in fee simple, S. Rep. No. 1123, 86th Cong., 2d Sess. 2, 4 (1960), and Subsection (c) permits the Secretary to transfer lands that the government holds in trust to tribal or municipal corporations. Congress had no occasion to revisit Section 635(a)'s provisions in the 1960 statute that added Subsections (b) and (c) because Congress had rendered Section 635(a)'s Navajo- and Hopi-specific authority superfluous in 1955 by enacting 25 U.S.C. 415 to authorize *all tribes* to enter 25-year leases (with 25-year extensions) for the purposes identified in Section 635(a). 25 U.S.C. 415 (1958); cf. S. Rep. No. 1123, *supra*, at 4 (Interior's recommendation to raise maximum lease term only in Section 415 to keep "our long-term leasing authority in one place," noting that a related amendment to Section 635(a) "would serve no useful purpose").[5]

e. The Tribe contends (Br. 36) that Section 638 embodies statutory duties of "disclosure, communication and [tribal] participation." That provision provides that both the "Navajo and Hopi" Tribal Councils and any "Indian communities affected" be "kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Rehabilitation Act]." 25 U.S.C. 638.

The "program authorized by [the Act]," however, is the "program of basic improvements" that Congress defined in Section 631 as development "projects" concerning matters such as "surveys" of coal resources that Congress "authorized and directed [the Secretary] to undertake, within the limits of the funds * * * [that Congress] appropriated

[5] The 1960 statute amended Section 415 to increase the maximum term for such leases by the Navajo to 99 years, thereby rendering the leasing authority in Section 635(a) not only superfluous but substantially inferior. See 25 U.S.C. 415 (Supp. II 1960).

pursuant to [the Act]." 25 U.S.C. 631. Indeed, Section 631's pertinent text tracks nearly verbatim the text of the Interior Secretary's 1948 legislative proposal to Congress, which identified the Act's "program of basic improvements" as the series of development projects involving "capital expenditures" for which Congress authorized appropriations in Section 631. See J.A. Krug, *The Navajo: A Long-Range Program for Navajo Rehabilitation* IX-X, 50 (1948). Congress similarly enacted verbatim as Section 632 the Secretary's proposal that the "*foregoing* program" be "complet[ed] * * * , so far as practicable, within ten years from the date of the [Act's] enactment." 64 Stat. 45 (emphasis added). The "program"—which Congress itself concluded had ended around 1964, when appropriated funds were exhausted, Gov't Br. 44-45—therefore did not include the Secretary's approval of tribal leases under Section 635. See *The Navajo* VIII, 50-51. That provision was subsequently added in the drafting process to address the distinct problem of under-investment resulting from inadequate leasing authority for non-mining purposes. Gov't Br. 46-47.

Section 638 specifies that the Navajo and Hopi Tribal Councils and any affected communities shall be informed of "plans" to expend congressionally appropriated funds on projects under the "program," and logically permits the Tribal Councils and communities to consider the agency's development plans from their inception and to make pertinent recommendations. But, even if Section 638's notice and consultation provisions were applicable here, the Tribe does not answer our explanation that any such procedural requirements could not constitute *money-mandating* duties. Gov't Br. 46 n.9.

Moreover, even if tribal leasing were part of the "program" authorized by the Act, Section 638 provides that the Secretary shall follow recommendations from the Navajo

and Hopi Tribal Councils regarding the program when "*he deems* them feasible and consistent with the [Act's] objectives," 25 U.S.C. 638 (emphasis added), "not simply when" they "are" actually feasible and consistent. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988). That language "fairly exudes deference to the [Secretary]," arguably altogether "foreclose[s] the application of any meaningful judicial standard of review," *ibid.*, and, at the very least, cannot be read as imposing an enforceable *duty* to follow the Tribe's requests.

In any event, the Secretary's actions complied with any Section 638 duties to the Tribe. The Tribe had notice of Peabody's proposal for additional negotiations in lieu of an immediate decision on appeal, J.A. 98-100, submitted its views to the Secretary, J.A. 119-121, 420-423, and was advised that Interior officials were aware of its "concerns regarding settlement." J.A. 125. The Secretary ultimately suggested to Deputy Assistant Secretary Fritz to "urge [the parties] to continue with efforts to resolve th[e] matter" by agreement. J.A. 117-118. That decision was fully justified by Lease 8580's importance to the Tribe and the Secretary's judgment—consistent with prior judgments by other officials in this case—that an agency decision in Peabody's appeal would "almost certainly be the subject of protracted and costly appeals" and could risk the parties' future relationship under that lease. *Ibid.*; Gov't Br. 8 n.2. In short, the Rehabilitation Act established no specific duties that the Secretary violated, much less money-mandating ones for which damages are available.

2. SMCRA

The Tribe's effort (Br. 40-42) to justify the Federal Circuit's reliance on SMCRA is even less persuasive. The Tribe, for instance, makes no attempt to defend the court's conclusion that 30 C.F.R. 750.6 imposed any pertinent du-

ties here, citing that regulation only once (Br. 9) as background. Cf. Gov't Br. 48-49.

The Tribe instead exclusively relies on Section 1300(e), but it has no answer to the fact that Section 1300(e) governs only "leases issued after August 3, 1977," 30 U.S.C. 1300(e), and therefore does not apply to Lease 8580 (issued in 1964). Gov't Br. 50. The Tribe's failure to argue otherwise is fatal to its SMCRA contentions.

Even if Lease 8580 were subject to Section 1300(e), that provision governs the approval of lease terms and conditions related only to SMCRA, not royalty-rate terms like those here. Gov't Br. 52. Subsections (c) and (d) of Section 1300 both specify particular SMCRA requirements that must be added to tribal leases, and Subsection (e)—the last in the series of those three related provisions—governs approval of terms and conditions "requested" by tribes "in addition" to the "required" terms in Subsections (c) and (d). See 30 U.S.C. 1300(e). That structure demonstrates that the "addition[al]" terms must also be SMCRA-related. Gov't Br. 51-52. The Tribe's contention (Br. 40-41) that Subsection (e) is "unambiguous[]" and "broad[ly]" covers even royalties, reflects a bizarre interpretation of SMCRA's targeted *environmental* provisions for surface mining. Other statutes provide the general authority for tribal leasing for mining. If the Tribe were correct, the Secretary's consideration of all tribally requested surface-mining lease terms would be governed by SMCRA, not—as heretofore understood—by the Secretary's general mineral-lease approval authority in IMLA. The Secretary's contrary interpretation is at the very least reasonable and entitled to *Chevron* deference. Gov't Br. 52.

Finally, the Tribe contends (Br. 41) that the Secretary's interpretation of Section 1300(e) in 25 C.F.R. 200.11(b) does not apply because it was issued in 1989 after the events in

this case. Section 200.11(b)'s predecessor, 30 C.F.R. 750.20(b) (1987), was promulgated in 1984 and merely tracked Section 1300(e)'s text while requiring that approval requests be in writing. It did not expressly address what "terms and conditions" could be requested. The Secretary resolved that issue in 1985 by interpreting Section 1300(e) in response to litigation so as to make explicit what was in any event clear. And, in 1989, the Secretary promulgated Section 200.11(b) once the Tribe's related litigation terminated. 53 Fed. Reg. 3993 (1988); see 54 Fed. Reg. 22,182 (1989). In any event, the Secretary's interpretation of Section 1300(e) applies to—and is entitled to *Chevron* deference for—events predating Section 200.11(b), just as judicial decisions apply to disputed events predating those rulings. *Smiley* v. *Citibank*, 517 U.S. 735, 744 n.3 (1996); *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984); *Manhattan Gen. Equip. Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936).[6]

B. The Indian Tucker Act's Waiver Of Sovereign Immunity Does Not Extend To Claims Based On Purported Common-Law Trust Duties

1. The Tribe's reliance on common-law principles is equally—and fundamentally—mistaken. *Navajo* makes clear that the Indian Tucker Act's limited waiver of sovereign immunity requires a two-step analysis in which a plaintiff, at the "threshold," must show a "substantive source of law that establishes specific fiduciary or other duties" that "the Government has failed faithfully to perform," by establishing that the government violated "*specific* rights-creating or duty-imposing *statutory or regulatory prescrip-*

[6] The regulatory observation that all coal-lease terms are subject to Secretarial approval (Br. 42) simply reflects that "other [non-SMCRA provisions] govern[] the leasing process." 54 Fed. Reg. at 22,187.

tions." 537 U.S. at 506 (emphasis added). Only after that threshold is crossed may common-law principles be considered at the second step to determine whether the pertinent statutes or regulations, in addition, "mandat[e] compensation for damages sustained as a result of a breach." *Ibid.*; Gov't Br. 31-34, 37-39. The Tribe's view (Br. 32-33, 49-52) that plaintiffs may recover money damages for a breach of "duties [found] in general trust law, rather than in statutes and regulations," ignores the Court's controlling decision in this very case.

Because the statutes on which the Tribe relies do not themselves contain specific rights-creating or duty-imposing duties, the Tribe necessarily suggests that *new* trust duties may be imposed by courts in addition to the duties specified in substantive laws. That approach departs significantly from this Court's teachings. The Court has long understood the Indian Tucker and Tucker Acts provide "the same access" to relief, *Mitchell I*, 445 U.S. at 539, and to require plaintiffs' claims to be founded on "any Act of Congress or any regulation of an executive department," 28 U.S.C. 1491(a)(1), 1505. See Gov't Br. 31. The Tribe's reliance on common-law principles does not raise a claim founded on such sources.

Nor can a group of statutes properly be construed "in bulk" as a justification for imposing new, extra-statutory duties based on common-law notions merely because the relevant provisions have some relation to a common theme (*e.g.*, tribal coal). Sources like IMLA, the Rehabilitation Act, SMCRA, and their associated regulations are distinct sources of law enacted by different bodies at different times to address different subjects, and they therefore cannot reasonably be understood to embody the requisite considered judgment to impose additional duties beyond those which each imposes separately. Nor does the Tribe identify

any basis in this Court's jurisprudence for its novel, common-law conception of the judicial function under the Tucker Acts.

Navajo, as noted, clearly holds that the "threshold" inquiry—necessary to bring a claim within the terms of Congress's waiver of sovereign immunity—requires a showing that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S. at 506; Gov't Br. 32-33. The Tribe's brief fails to discuss that holding.

United States v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*Apache*), in turn, was decided the same day as *Navajo* and dealt with a unique, single-sentence statute (not a network of loosely related provisions) that employed the term "trust" as a term of art and authorized the government's exclusive occupation and use of the trust corpus for its *own purposes*, thereby triggering duties resulting from such self-serving action. Gov't Br. 35-36. *Apache* accordingly construed the terms of the statute *itself* as imposing specific duties in that unusual context. *Ibid.*; see also *Apache*, 537 U.S. at 480-481 (Ginsburg, J., concurring).

Similarly, *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), carefully employed the two-step analysis reaffirmed in *Navajo* by partitioning its opinion into Part III.A (addressing specific rights-creating and duty-imposing statutes and regulations) and Part III.B (applying its money-mandating analysis). See *id.* at 219 (summarizing Part III); Gov't Br. 37-39. While the Tribe recounts (Br. 42-46) several of the statutory and regulatory provisions examined at the first step of *Mitchell II*'s analysis, the Tribe fails to recognize that the Court discussed the *duties* the government allegedly violated that could be attributed to those statutes and regulations *without* relying on general common-law trust principles. Compare 463 U.S. at 210 (claims),

with *id.* at 219-223 (discussing provisions); Gov't Br. 37-38 & n.8. The Court's reliance on general trust concepts was thus limited (in Part III.B) to the second step, evaluating the money-mandating nature of the provisions *after* the Court had already surveyed the pertinent statutory and regulatory duties at issue. *Id.* at 38.

The Tribe contends (Br. 51) that *Mitchell II* identified duties that were not "expressly required" by a statute or regulation. Even if the Tribe were correct, the dispositive point is that the Court understood specific statutes or regulations as governing those duties and did not borrow from common-law principles to create new duties from whole cloth. See *Navajo*, 537 U.S. at 505-506 (noting that *Mitchell II* was premised on the view that "*statutes and regulations * * * clearly require[d]* that the Secretary manage Indian resources so as to generate proceeds for the Indians") (quoting *Mitchell II*, 463 U.S. at 226-227) (emphasis added).

2. The Tribe's theory would impermissibly allow judge-made obligations inspired by common-law notions to effectively supersede the federal statutes and regulations that directly govern agency conduct. Here, for instance, the Federal Circuit held that the government had and violated "common law trust duties of care, candor, and loyalty" in connection with its coal-leasing actions because the government's role in non-leasing aspects of coal regulation gave it, in the court's view, "comprehensive control" over "coal resources." Pet. App. 31a-32a, 38a, 42a. Yet this Court previously held that "imposing fiduciary duties on the Government here" would contravene one of IMLA's "principal purposes" because IMLA "giv[es] Tribes, not the Government, the lead role in negotiating mining leases" in a manner "directly at odds with Secretarial control over leasing." *Navajo*, 537 U.S. at 508. As a result, the Federal Circuit

has displaced the detailed statutory and regulatory scheme that specifically governed the actions at issue here.

The incoherence of the Tribe's defense of the Federal Circuit's common-law-duty approach is highlighted by its repeated reliance (Br. 6, 15, 37, 40, 45-47, 52) on IMLA's regulations in 25 C.F.R. Part 211. *Navajo* examined the Part 211 regulations and held that "no provision of the IMLA or *[those] regulations* contains any trust language with respect to coal leasing," demands that the Secretary "conduct an independent 'economic analysis'" of lease terms negotiated by the Tribe, or requires the Secretary to exercise his lease-approval authority to ensure a royalty rate higher than the 12.5% to which the Tribe agreed. 537 U.S. 508, 511 & n.16 (emphasis added). Yet, under the Tribe's theory such regulations somehow remain pertinent to the "network" supporting the common-law obligations imposed by the Federal Circuit.[7]

The Tribe similarly relies (Br. 46 n.14) on IMDA, but *Navajo* held that IMDA applies only to *non-leasing* mineral-development agreements. 537 U.S. at 509. And, while the Tribe's "network" rests most heavily on the Rehabilitation Act and SMCRA, neither has anything do with Lease 8580 or the Secretary's actions in this case. What remains are the non-statutory, non-regulatory, common-law duties that the Federal Circuit improperly superimposed on IMLA's governing provisions.

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[7] The Tribe suggests (Br. 15, 37, 46) that the Secretary violated 25 C.F.R. 211.2 (1987) by permitting the Tribe's negotiations to extend beyond 30 days. The pertinent 30-day time-period following written authorization to negotiate a lease without public bidding does not apply to negotiations to amend existing leases. Pet. App. 144a-145a; see C.A. App. A870-A871. Moreover, the regulatory clock never started because no *written* permission was granted, *ibid.*, until the Secretary ratified the negotiations in 1987. J.A. 338.

Such an imposition of judge-made, common-law duties, moreover, would interject considerable uncertainty in the administration of government functions. Gov't Br. 41-42. Agencies have great latitude to devise their own procedures, *ibid.*, and courts normally give agencies considerable deference in their construction of governing statutes and implementing regulations, thereby enabling agencies to resolve ambiguities in their obligations during the course their administration of federal programs. Permitting courts to superimpose additional common-law duties enforceable in money damages years after the fact puts federal agencies in an untenable position.

Indeed, as this case illustrates, *ex parte* contacts are permissible in informal agency decisionmaking absent a statutory or regulatory prohibition. See Gov't Br. 6, 41-42; 01-1375 Oral Arg. Tr. 5-7, 34-36 (Dec. 2, 2002). Moreover, agency adjudicators obviously are expected to act fairly to both sides and are therefore authorized to take actions that a tribal litigant may believe are not "favorable" to it, particularly where the relevant lease contemplates only "reasonable" royalty adjustments by the Secretary (J.A. 194). The lease's royalty provisions obviously did not require any and all revisions that maximized Tribal revenues. No non-Tribal party would ever characterize such adjustments as "reasonable," much less consent to such a one-sided adjustment mechanism as a substantive matter. And here, the lease amendments the Secretary approved in 1987 provided for a six-fold increase in royalties under the existing lease. Gov't Br. 5, 10. While less than the 20% the Tribe sought in order to maximize its return, that result under an existing lease previously agreed to by the Tribe is surely reasonable, especially since 12.5% was the standard rate under federal and tribal coal leases. Yet the Tribe claims (Br.

52)—and the Federal Circuit held—that such actions in this case were "improper and a breach of trust."

C. In Alleging Generalized Breaches Of Fiduciary Duty, The Tribe Mischaracterizes The Underlying Events

In alleging generalized breaches of fiduciary duty, the Tribe attempts to put the Secretary's conduct in the worst possible light, often making assertions and drawing conclusions that are unsupported by the record. The Federal Circuit's grant of summary judgment on liability for the Tribe, however, necessitates that all reasonable inferences be drawn in the government's favor. But even if all reasonable inferences were made favoring the Tribe, the Tribe's characterization would lack evidentiary support.

For example, the Tribe contends (Br. 15) that it "negotiated 'unarmed with critical knowledge,'" but fails to identify what knowledge was critically lacking. The Tribe knew that Peabody had asked Secretary Hodel to "postpone a [decision] to allow for a voluntary settlement"; indeed, it twice responded to Peabody's July 5, 1985 letter making that request. J.A. 100, 119, 420. The fact that a Peabody representative also may have made that request to the Secretary in person—in a meeting that was lawful under regulations governing the appeal and general principles of administrative law, *Navajo*, 537 U.S. at 513; Gov't Br. 41-42—cannot support the Tribe's damages claim. The Tribe premises its claim on the Secretary's decision to "suggest" that Deputy Assistant Secretary Fritz follow that requested course by "inform[ing] the involved parties that a decision on th[e] appeal is not imminent and urg[ing] them to continue with efforts to resolve this matter in a mutually agreeable fashion." J.A. 117. But the Secretary expressly advised Fritz that his suggestion was "not intended as a determination of the merits of the [parties'] arguments" on

appeal. J.A. 118. Interior's Associate Solicitor accordingly informed the parties by letter dated August 29, 1985, that Fritz was aware of their "concerns regarding settlement" but that an appeal decision was still pending and "ha[d] not yet been finalized." J.A. 125; Gov't Br. 8-9.

Moreover, the record now shows—and the Tribe no longer disputes—that Chairman Zah met with Fritz in 1985 (presumably reflecting a view that such *ex parte* meetings were lawful) and was informed that Fritz would not decide the appeal "until the Navajo Tribe made a final attempt to negotiate with Peabody to avoid further litigation." J.A. 452. Chairman Zah thus told Peabody representatives during renewed negotiations on August 30, 1985, that the "impetus for the[ir] meeting" was that "it appears Secretary Hodel ha[d] asked the Navajo to make an effort to reach some settlement of the lease issues." 00-5086 C.A. App. A2370. As negotiations continued, the Tribal Council too was well aware that the "Secretary had asked [the parties] to sit down and try to work out their differences" and had "indicated an unwillingness to act on th[e appeal] until [they] had given it one last shot." J.A. 465. And, because the Tribe had done so, the Council was assured that "the Secretary could decide that royalty appeal" if the Tribe elected not to go forward with the resulting tentative settlement. *Ibid.* The Tribe nevertheless continued negotiations until it approved an agreement in August 1987, based on the Tribe's express determination that the deal was "in the best interest of the Navajo Nation." J.A. 473.

The Tribe admits that it knew and considered its legal options (see Gov't Br. 11 n.5), for the Tribe notes (Br. 16) that it had to "decide" whether to resolve its dispute by negotiated agreement, continue to litigate the administrative appeal, transfer the appeal to a more formal process before the Interior Board of Indian Appeals, or file suit.

Such choices are inherent in ILMA, which is "designed to advance tribal independence" by "giving Tribes, not the Government, the lead role in negotiating mining leases." *Navajo*, 537 U.S. at 494, 508. Moreover, Interior officials repeatedly offered to assist the Tribe in its negotiations, but the Tribe's leadership decided that "they'd rather negotiate without the BIA's appearance." 00-5086 C.A. App. A2267, A2277, A2609.

In light of *Navajo*'s holding that the Secretary had no duty "to conduct an independent 'economic analysis'" of the Tribe's agreed royalty and that requiring "Secretarial control over leasing" decisions would be "directly at odds" with one of IMLA's "principal purposes," 537 U.S. at 508, 510-511; see J.A. 553, the Tribe's contention (Br. 15-16) that the amendments *it negotiated* were unfair is beside the point. In any event, the Tribe has conceded that "many aspects of the renegotiated lease package" were "favorable" and that it does "not wish to invalidate the entire agreement." Pet. App. 137a. As that position shows, that agreement embodied trade-offs for both sides. For instance, the coal's remote location reduced its value because "unique and expensive transportation" infrastructure would have had to have been "replicated" by a different company, J.A. 352-353, 485, yet the Tribe secured a 12.5% royalty—the standard royalty on all federal (and the Tribe's own) leases at the time—which the Tribe and its experts (including a former high-ranking official in the Iranian oil ministry) deemed reasonable and in the Tribe's best interest as part of the overall package. Gov't Br. 10-11 & n.4; Peabody Amicus Br. 32-36; J.A. 388-389, 443, 473, 477, 489, 518; C.A. App. A2681; cf. J.A. 553-554.[8]

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[8] The Tribe states (Br. 54) that the Court "struck" the lodging of a cited report (J.A. 538-546) in 2002. Cf. *United States* v. *Navajo Nation*,

Ultimately, the Tribe resorts (Br. 13, 15, 37, 52-53) to asserting that the "Secretary secretly allied himself with Peabody," that Interior "leaked" a draft appeal decision to Peabody, and that a career Interior attorney "intentionally misled" the Tribe in drafting a letter stating that no decision had been finalized in that appeal. Those assertions have no support in the record.

The Secretary's memorandum to Fritz expressly stated that the Secretary "d[id] not necessarily agree" with all the points in Peabody's July 5 letter, but that, as discussed above, he concluded that there appeared to be "significant advantages" to a negotiated solution over a royalty adjustment imposed on the parties. J.A. 117. The Secretary "assure[d]" Fritz that he was *not* making any "determination of the merits of the [parties'] arguments" on appeal and merely preferred giving the parties additional time "to sit down and work out their differences." J.A. 118. Those views were well known by the Tribe. J.A. 452, 465.

Likewise, the Tribe's own citations do not support its assertion that Peabody received a copy of the draft appeal decision. They instead indicate that Peabody *learned from the Tribe* that a decision was imminent. The Tribe's *ex parte* contacts with Interior officials led it to expect that a favorable decision would be issued in mid-June 1985, Gov't Br. 7; and when Tribal representatives later informed Peabody that "further negotiations * * * would be held in abeyance pending a decision," Peabody was "caught unaware," interpreted the Tribe's "sudden interest" in a ruling as "suggest[ing] that a decision might be imminent" and favorable to the Tribe, and promptly called the Interior So-

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537 U.S. 808 (2002) (striking amicus lodging). That report and other evidence was filed on remand on March 23, 2005, the Tribe's motion to strike that evidence was denied, and its associated sanctions motion was rejected as "frivolous." 9/28/05 Tr. 7-8.

licitor's Office on July 3, learning that a "decision might come 'in perhaps two weeks.'" C.A. App. 725; *id.* at 724, 1547 (Tribe "[i]nformed" Peabody that "they had heard that a decision favorable to Navajo would be forthcoming"); J.A. 154-155 (Tribe's proposed findings). Peabody then wrote the Secretary on July 5, explaining that the Tribe suspended "further negotiations" because it "[a]pparently * * * has received word of an imminent and favorable decision." J.A. 98-99.[9]

Finally, nothing indicates that an Interior attorney intentionally deceived the Tribe in drafting an August 29, 1985 letter explaining that a decision had "not yet been finalized," J.A. 125. The record shows that she did not "remember any of the discussions" about that letter in her 1995 deposition, simply "guess[ed]" that it was drafted not to tell the Tribe of the Secretary's "instruction" to ask the parties to negotiate, and explained that the letter was accurate in the sense that Fritz had "not decided the appeal," which was still pending "before him." 00-5086 C.A. App. A1447, A1450. She added that she did not "know what the Navajo Nation knew" but that, if the "only thing [it] was told" was that the appeal remained pending, it might be understandably "upset" or "outraged." *Id.* at A1459-A1460. The Tribe, however, *was* informed of the Secretary's request, and even the Tribe's own proposed factual findings

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[9] A Southern California Edison employee similarly explained that he did not "recall ever seeing" a draft decision and did not know if he was "ever aware" that a "tentative decision" had been reached. J.A. 515-516. His somewhat confused testimony adds that he thought he might have learned that a decision was drafted to reject Peabody's appeal and "assume[d]" that he would have learned such information by talking to Peabody. J.A. 516. Of course, Peabody's views were based on its interactions with the Tribe.

do not contend that the attorney "intentionally misled" it. J.A. 168-169.[10]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General

FEBRUARY 2009

[10] If the Tribe had asserted in its proposed findings that the attorney intentionally misled it, the government could have rebutted that allegation by filing her complete deposition to supplement the excerpted version filed by the Tribe. Cf. 00-5086 C.A. App. A1423-A1460.